1994

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Recommended Citation

White, James J. "Work and Play in Revising Article 9 (Symposium on the Revision of Article 9 of the Uniform Commercial Code)." Va. L. Rev. 80, no. 8 (1994): 2089-102.

WORK AND PLAY IN REVISING ARTICLE 9

*James J. White**

FOR Professors Harris and Mooney the time has come to distinguish between work and play. Debating whether security is efficient is play. Revising Article 9 is work. Even Professor Schwartz does not argue for the abolition of Article 9; he merely reiterates the "puzzle" of secured credit and argues in his playful fashion that security might not be efficient.[1] Were it not for the fact that this debate might give us some insights about certain priority rules (such as those having to do with purchase money), it would be pure intellectual masturbation, a game with no purpose other than to satisfy and stimulate one's intellect. So Professors Harris and Mooney are right to deflect the question, whether security is efficient; they could have done so in fewer words than they have in their paper.

To understand why the efficiency debate is irrelevant to the Article 9 revision process, consider three points. First, personal property security is probably efficient. In fact, no one has asserted otherwise, and even the most skeptical have only raised questions. I conclude it is probably efficient because I am convinced by the arguments given in this Symposium by Professors Kanda and Levmore[2] and by those given elsewhere.[3] The pervasiveness of

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[1] Alan Schwartz, The Continuing Puzzle of Secured Debt, 37 Vand. L. Rev. 1051 (1984); Alan Schwartz, Security Interests and Bankruptcy Priorities: A Review of Current Theories, 10 J. Legal Stud. 1 (1981).

[2] Hideki Kanda & Saul Levmore, Explaining Creditor Priorities, 80 Va. L. Rev. 2103 (1994).

[3] Barry E. Adler, An Equity-Agency Solution to the Bankruptcy-Priority Puzzle, 22 J. Legal Stud. 73 (1993); Richard L. Barnes, The Efficiency Justification for Secured Transactions: Foxes with Soxes and Other Fanciful Stuff, 42 Kan. L. Rev. 13 (1993); James W. Bowers, Whither What Hits the Fan?: Murphy's Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution, 26 Ga. L. Rev. 27 (1991); F.H. Buckley, The Bankruptcy Priority Puzzle, 72 Va. L. Rev. 1393 (1986); Thomas H. Jackson & Alan Schwartz, Vacuum of Fact or Vacuous Theory: A Reply to Professor Kripke, 133 U. Pa. L. Rev. 987 (1985); Thomas H. Jackson & Anthony T. Kronman, Secured Financing and

security not only in modern industrial society but also in more primitive and ancient societies supports the argument. Never has security been required by law; always it has been chosen by debtors and creditors. Were it inefficient, why and how has it persisted for so long, in so many ways, in so many places?

A second reason to dismiss the inefficiency argument as irrelevant to the Article 9 debate is that those with power to act on the argument cannot be convinced of its merit. Banks and other secured creditors hold the power in the Article 9 debate.[4] Banks

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Priorities Among Creditors, 88 Yale L.J. 1143 (1979); Homer Kripke, Law and Economics: Measuring the Ecouomic Efficiency of Commercial Law in a Vacuum of Fact, 133 U. Pa. L. Rev. 929 (1985); Saul Levmore, Monitors and Freeriders in Commercial and Corporate Settings, 92 Yale L.J. 49 (1982); Randal C. Picker, Security Interests, Misbehavior, and Common Pools, 59 U. Chi. L. Rev. 645 (1992); Robert E. Scott, A Relational Theory of Secured Financing, 86 Colum. L. Rev. 901 (1986); Paul M. Shupack, Defending Purchase Money Security Interests Under Article 9 of the UCC From Professor Buckley, 22 Ind. L. Rev. 777 (1989); Paul M. Shupack, Solving the Puzzle of Secured Transactions, 41 Rutgers L. Rev. 1067, 1073-83 (1989); George G. Triantis, Secured Debt Under Conditions of Imperfect Information, 21 J. Legal Stud. 225 (1992).

[4] Very early in the Code's development the infiuence of certain interests was apparent to observers. In 1951, oue academic critic of the drafting process observed: "Of course there was copious advice from commercial pressure groups like the American Bankers Association. But this is always slanted in the interest of the group and is likely to do more harm than good." Frederick K. Beutel, The Proposed Uniform Commercial Code as a Problem in Codification, 16 Law & Contemp. Probs. 141, 144 (1951). The banks' inclination to resist change, and the infiuence they commanded, was also evident early on. During hearings of the New York Law Review Commission on adoption of the Uniform Commercial Code, Professor Gilmore tersely challenged both the substance of and motivation behind statements prepared by the New York Clearing House (a group of Manhattan attorneys) criticizing the proposed statute:

> The memoranda . . . were so riddled with mistakes, inaccuracies, misreadings and misconstructions as to be largely untrustworthy and as to throw grave doubt on the professional competence in this field of those who prepared the memoranda. It cannot be overlooked that these memoranda were submitted to this Commission by representatives of some of the largest banks in New York City, advised presumably by competent counsel.

Report of the Law Revision Commission and Record of Hearings on the Uniform Commercial Code for 1954, at 1161 (1954) (statement of Professor Gilmore). Later in the development of Article 9, the drafter's deference to creditors' interests is plain and unabashed. For instance, in a discussion of changes to § 9-304(5) and § 9-312 requiring that notice be given before the debtor receives inventory as a condition to the purchase money interest obtaining priority, the 1971 Final Report of the Article 9 Review Committee notes: "The Committee's inquiry to several leading banks engaged in foreign trade indicated that this rule would not seriously inconveuience them, and the rule will certainly clarify the position of these banks and all other lenders when acting as general inventory financers." Review Committee for Article 9 of the Uniform Commercial Code, Permanent Editorial Bd. for the Uniform Commercial Code, Final Report 222-23 (1971).

and other secured creditors have shown no sign that they are, or can be convinced, that secured credit is inefficient. On the contrary, they worship security with apostolic zeal. The secured creditors' argue for stronger and broader security, not for weaker and narrower security. And no one has less power in such a debate than a law professor with a counterintuitive idea. Unless these secured creditors can be convinced that it is in their interest to have Article 9 abolished, Article 9 will continue and the debates about its efficiency will be limited to academics. At most, we academics might snatch a small morsel off the table while the banks' attention is diverted; we will not be seated at the main course.

There is a final reason to favor Article 9 even if it is inefficient: the state of affairs that would arise upon the abolition of Article 9 would be almost certainly less efficient, more costly, and more wasteful than the current regime. Those costs and that inefficiency outweigh any inefficiencies caused by Article 9.

We need not speculate about the regime that would prevail upon the abolition of Article 9. Commercial law in the United States between 1900 and 1960 shows us that regime. It was a patchwork of security devices that varied from state to state, from creditor to creditor, and by type of collateral, transaction, or both.[5] There were weird and expensive security devices such as chattel mortgages, notification of account debtors, consignment of goods, pledges, set off, and field warehouses. And do not forget the judicial collection devices such as confessions of judgments and the like.

Of course, not all of these dinosaurs would rise from the grave upon the abolition of Article 9. Some are unconstitutional[6] and

[5] Professor Gilmore's treatise provides exhaustive treatment of pre-Code security devices. 1 Grant Gilmore, Security Interests in Personal Property 3-286 (1965).

[6] See, e.g., North Ga. Finishing v. Di-Chem, 419 U.S. 601 (1975) (holding that the garnishment process by which plaintiff in a pending suit makes affidavit to authorized official or court clerk and posts bond provides inadequate notice, opportunity to be heard, and participation by a judicial officer); Fuentes v. Shevin, 407 U.S. 67 (1972) (holding that Florida and Pennsylvania procedure for summary issuance of a writ of replevin upon application to court clerk by someone suing on a claim of "wrongfully denied" property and posting a bond fails to provide adequate notice and opportunity to be heard); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (holding that the Wisconsin procedure violated Fourteenth Amendment by failing to provide notice and opportunity to be heard before wage garnishment).

others could be prohibited by statute, but I would bet a small amount of money that for every weird animal killed by statute another would take its place. If I am right about this prediction, the cost of these security substitutes would grossly exceed the cost of the Article 9 security system.

It is not novel to propose tolerance of an antisocial or wasteful institution because the cost of abolishing it is greater than the cost of tolerating it. It took the United States fourteen years to conclude that the cost of prohibiting the drinking of alcohol was greater than the expense of tolerating it.[7] In one way or another society has come to similar conclusions at different times concerning fornication, gambling, smoking, and even taking dope.[8] To concede that something is inefficient, wasteful, or otherwise antisocial is not to prove that its prohibition is wise or efficient.

I cannot prove that creditors would revert to the pre-1960 arcane security devices if Article 9 were repealed. Nor can I prove that the security substitutes developed in the absence of Article 9 would cause inefficiencies exceeding the largest conceivable inefficiencies that might be caused by Article 9. Yet both seem likely. The commercial markets of the United States between 1900 and 1960 tell unequivocally that security substitutes would exist. Those markets suggest that security substitution would be pursued and used in a vigorous way by a variety of creditors.[9]

For three reasons then, Professors Harris and Mooney should forget the efficiency debate. They should concentrate not on whether Article 9 should live but on what form it should take. They should do that first because security probably is efficient, and second because those who have the power over Article 9 will not listen to the naysayers even if they are right. Finally, Professors

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[7] See Dennis J. Mahoney, Prohibition, *in* Encyclopedia of the American Constitution 1482 (Leonard W. Levy et al. eds., 1986).

[8] The penalty for possession or use of marijuana in Ann Arbor, Michigan is a $25 fine. Ann Arbor, Mich., City Charter § 16.2 (1993).

[9] Ironically, by abolishing Article 9 and so denying security to the unsophisticated, one would make it a more valuable prize for the cognoscenti. Raising the cost of security would drive those who are only marginally interested out of the market. Under Article 9 many creditors can and often will have security in the assets of a bankrupt company. To the extent that a new regime turns those creditors from secured to unsecured, the payments to those holding security substitutes would increase and the value of those substitutes would increase.

Harris and Mooney should get on with Article 9 because—even assuming that Article 9 is inefficient—the most likely regime that would grow up in its absence would itself be more costly, more wasteful, and less efficient than Article 9.

I. Threats to the New Article 9

The real threat to Article 9 does not come from the economists; it comes from Professor Lopucki and other apologists for unsecured creditors.[10] Lesser threats come from consumers and from secured creditors themselves—more precisely from secured creditors' lawyers.

The arguments of the unsecured creditor are the most insidious and dangerous. Recognizing that they lack the power to defeat the banks in a pitched battle over the priority rules in section 9-301 or over the rights of sellers and buyers against secured creditors under section 2-702(3) and the like, the unsecured creditors are likely to wage guerilla warfare. In legislative skirmishes they will try to inflict small injuries on the secured creditors in the hopes that judicial bacteria will cause these small wounds to fester and ultimately disable the secured creditors. Or like terrorists pushing women and children in front of them, the unsecured creditors may use consumers to stay the fire of the secured creditors. Particularly in Part 5 but also in Parts 2 and 3 of Article 9, unsecured creditors can be expected to argue—perhaps in the name of consumers—for more detailed foreclosure protections, for more elaborate formality, and for other rights that when applied in the field are costly and treacherous for secured creditors. They may even argue for some form of notice race priority so the secured creditor who is on notice of certain unsecured creditors' claims will be subordinated. The experi-

[10] See, e.g., Lynn M. LoPucki, The Unsecured Creditor's Bargain, 80 Va. L. Rev. 1887 (1994).

ence of the nineteenth century shows the injury that can be done by detailed requirements allegedly enacted to protect debtors.[11]

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[11] Professor Gilmore describes this experience:

> Many of the older statutes required that signatures be acknowledged or verified and that the mortgage, when it was filed for record, be accompanied by affidavits of consideration or good faith or the like. Deviation from a strict compliance with these formalities was usually fatal, at least as to third parties; the defective mortgage, although filed, gave no constructive notice and, indeed, might be disregarded by the happy searcher who came across it in the records and spotted its technical defect. The mortgagee whose foot slipped at some point in the obstacle race of compliance with the formalities was better off if he did not file his mortgage at all, since, until his misstep was spread upon the record, he was at least protected against third parties with actual notice. How well these formal devices served as deterrents to fraud must be a matter of opinion. It is not inconceivable that a lender, intent on defrauding his borrower, may have been deterred by being required to have his siguature witnessed with solemn legal pomp and by being additionally required to swear that he had given consideration and was acting in good faith. On the other haud it is hard to escape the conclusion that most of the cases in which mortgages were set aside for one or another type of technical noncompliance involved entirely legitimate and good faith transactions; the cases were brought, not by the presumably defrauded mortgagor, but by his creditors (or their representatives) who had not in any sense been damaged or misled by the formal defect. None of the security statutes drafted in this century—including legislation on conditional sales, trust receipts, factor's liens and accounts receivable—followed the chattel mortgage acts, either as to signature formalities or accompanying affidavits.
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> Closely related to the formality cases were the description cases. It is an entirely sound requirement that a security agreement contain a description of the collateral from which not only the parties to the transaction but third parties who may be affected by it may determine which assets of the borrower are subject to the security interest and which are free. In the chattel mortgage cases, however, many courts, perhaps inspired by the painfully exact requirements of description which have traditionally been insisted on in sales and mortgages of land, went to absurd lengths in requiring comparably exact descriptions of chattels. The description requirement was sometimes treated as a sort of statute of frauds, so that failure to describe the mortgaged property in terms which suited the court's arbitrary whim voided the mortgage and could not be cured even by uncontroverted and uncontrovertible proof of what was covered by the mortgage. A typical case of this sort would set aside a mortgage of machinery, described in the mortgage in such a way that there could be no possible doubt what machinery was meant, because the serial numbers of the machines were missing.
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> Nineteenth century cases of this sort can be explained on the grounds that the real estate mortgage analogy was more compelling seventy-five years ago than it is today and that the period was one of generalized judicial hostility to all chattel security transactions with the borrower remaining in possession. If it is assumed that the only good mortgage is a dead mortgage, it must be a laudable act to do a mortgage to death with any weapon that comes to hand. Neither ground would justify such mortgage murder today. The specialized chattel security devices have been relatively free from requirements of overnice description and the type of notice filing provided for in trust receipt and factor's lien legislation dispensed with any

The consumer threat rests upon the consumer's inalienable and inexhaustible right to legislative sympathy. One should not forget that every single resident of Leavenworth and San Quentin is a consumer. And each of those sweet persons who used to live in your house and lie to you so boldly and without remorse in their teenage years is now a consumer. However deceitful and nasty the behavior of Bank of America or Citicorp and their ilk, the number of evil acts of all American banks from the beginning of time is equaled daily by the frauds and evil acts of consumers. So a starting point in answer to consumer requests for generous treatment in Article 9 is to recognize that the consumer class overflows with liars and cheats. The drafters should purge the idea of the noble consumer who borrows in ignorance, who is surprised by repossession and deficiency judgment, and who claims incredible promises by his creditor.

But even if the consumer has to be given some special rights in Article 9, that would not be the end of the world. The important thing is to be sure that consumer privileges—however misguided—do not also spread to the business debtor or, worse yet, inure to the benefit of the unsecured creditors of a business.

Left to their own devices, the secured creditors may do injury to Article 9. The natural inclination of secured creditors—particularly of their lawyers who are called upon to issue opinion letters—is to have a rule for every possible circumstance. Unfortunately each provision added to solve a tiny problem is itself a seed of confusion. The more narrow the problem, the more likely the new provision will later conflict with other provisions or be found to apply to transactions never contemplated by the drafters or the provision's proponents.

The cost and uncertainty that arise out of being too detailed in

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> item-by-item description in the document filed for record. It became peculiarly vexing when a description which would have been acceptable in a conditional sale contract was found fatally imprecise in a mortgage. In time no doubt, even apart from the enactment of Article 9 of the Code, the more liberal attitude which the courts adopted in dealing with the specialized devices would have made itself felt in the mortgage cases. The slightest laxness in a mortgage description remained, however, an open invitation to counsel for bankruptcy trustee or attaching creditor to take a whirl at upsetting the mortgage—and what was a federal court to do when the most recent state precedent was one of the 1890 serial-number models?

1 Gilmore, supra note 5, at 52-54 (footnotes omitted).

the quest for certainty are hard to quantify, but clearly they exist.[12] Yet it is hard to oppose the request for such provisions. Those requests, however minor, enjoy the same position as any legislation that is backed by a small but intensely interested group (the secured creditors here), and opposed by a diffuse and mildly interested group (the drafters, lawyers, and others generally interested in the Code). When there is no partisan opposition to such proposals, it is hard for the drafters to resist them on aesthetic or other grounds. Thus Professors Harris and Mooney, and, even more, the members of the drafting committee, must resist the requests for "opinion writer" provisions.

Even though each of the claims put forward by the unsecured creditors standing alone can be defended, and even though each has a melodic appeal to equity, most should be rejected. Article 9's strength has been its stern rejection of equity; it has rightly chosen certainty over equity as the true way.[13]

Professors Harris and Mooney must be vigilant in opposition to small wounds. They must defeat not only guerrilla attacks of the unsecured creditors, but also be alert to ruses of trade creditors dressed in consumers' clothing. Surely society does not profit by an Article 9 that ultimately serves the secured creditor's bidding but with the greatest waste and the largest expense. If, as I believe, all routes lead to the same destination but some are much more costly than the others, we should choose the least expensive.

II. Some Responses

Professors Harris and Mooney give good answers to some of the arguments raised by those who champion the unsecured creditor's case, but they do not address a fundamental question raised by Professor LoPucki, the unsecured creditor's most articulate advo-

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[12] Consider, for example, the revised Article 3 regime covering imposters, fictitious payees, and employer's responsibility, governed by § 3-404 and § 3-405 (though the latter section may overlap in some circumstances with § 3-308). Here the drafters anticipated complex factual situations and drafted accordingly. Admittedly it is too soon to tell whether these provisions will clarify or compound confusion, but the drafter's product reveals the difficulties in trying to legislate against every contingency.

[13] "The aim of this Article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty." U.C.C. § 9-101 cmt. (1990).

cate. Professor LoPucki correctly shows that not all unsecured creditors are consensual creditors.[14] Some know they are going to be creditors but never make a contract with a debtor. (In this category are the tax claims of federal, state, and local governments and possibly some claims of hospitals that cannot throw bleeding consumers onto the street.) Others do not even contemplate the possibility of being creditors. (Included here are the tort claimants seen in *Manville*[15] and *Robbins*,[16] as well as others[17] who suffer more mundane collisions with trucks or cars of corporate debtors.) How should the revision of Article 9 deal with the claims of these people? Should these claims be subordinated to the secured creditor's claim? Or should some spot be made for them? Should they be treated like lien creditors who enjoy priority over secured creditors in some circumstances? I believe these are fair questions, but I doubt that Article 9 is the place to deal with them.

First of all I find any argument that we should give priority to certain of these creditors—the government, the hospitals, and the "cash-flow surfers" (known less felicitously as "trade creditors")—unpersuasive.[18] (In fairness, Professor LoPucki only hints at prior-

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[14] Lopucki, supra note 10, at 1896-97.

[15] In re Johns-Manville Corp., 36 B.R. 743 (Bankr. S.D.N.Y. 1984).

[16] In re A.H. Robbins, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

[17] See, e.g., In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710 (E.D.N.Y. & S.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992).

[18] Professor LoPucki's proposals have been anticipated by his even pinker friends in Eastern Europe. Article 64, Part I of the Proposed Civil Code of Russia, reads as follows:

> Article 64. Satisfaction of Demands of Creditors
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> 1. When liquidating a juridical person the demands of its creditors shall be satisfied in the following priority:
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> first priority: the demands of citizens to whom the juridical person being liquidated bears responsibility for the causing of harm to life or health by means of capitalising the respective time payments shall be satisfied;
>
> second priority: accounts shall be settled with regard to the payment of labour with persons who work under a labour contract and with regard to the payment of remuneration under authors' contracts;
>
> third priority: demands of creditors relating to obligations secured by the pledge of property of the juridical person being liquidated;
>
> fourth priority: indebtedness relating to obligatory payments to the budget and extra budgetary funds shall be paid;
>
> fifth priority: accounts shall be settled with other creditors in accordance with a law.

Proposed Civil Code of Russia Art. 3, Part 1 (translated by W.E. Butler, Professor, University College London) (untranslated manuscript, on file with the Virginia Law Review Association).

ity.[19]) His cash-flow surfers understand that they are lending money and can adjust their prices accordingly. The hospitals and the taxing agencies can fend for themselves. Certainly the federal and state governments know how to give themselves tax liens;[20] in some situations these liens now defeat even perfected secured creditors. I do not see why these governmental agencies need any help from the drafters of Article 9. The hospitals are another matter, but the taxpayers are going to take care of them, at least if President Clinton has his way.[21]

Professor LoPucki attracts the most support for change when he argues that tort claims (and perhaps employee claims for retirement pay or retiree medical benefits) be given priority over the claims of secured creditors. Even a barbarian finds it hard to argue that the debtor's last dollar should go to the secured creditor, not to the tort claimant to purchase medical treatment. The less barbaric may find it fair and reasonable to go farther up the chain; the pink may even reach cash-flow surfers. Whoever takes one step up this chain must ask how priority should be granted or protection given to a particular unsecured creditor, to the tort claimant, or to the retiree. Should it be provided by Article 9, by some government insurance program that is paid for by an industry tax (such as FDIC, SIPC),[22] or by a modification in the bankruptcy law (such as

19 Professor Lopucki observes that "we are on the brink" of recognizing that the priority of secured creditors over "truly" nonconsensual creditors is indefensible. Lopucki, supra note 10, at 1908. He acknowledges, however, that a legislative grant of priority to tort creditors might give rise to novel forms of security arrangements. See id. at 1910. Though he expresses optimism about courts' abilities to ferret out such arrangements, he also proposes a secured creditor insurance scheme. For the cash-flow surfers—those who extend credit and reasonably expect to be paid—Lopucki would bind them to the "unsecured creditor's bargain" only to the extent that a jury would find that a reasonable person in the cash-flow surfer's position would expect to be bound. Id. at 1947-48. He also proposes that the Article 9 filing system be redesigned to fulfill the needs of unsecured creditors. Id. at 1948.

20 See I.R.C. §§ 6321-6323 (1988 & Supp. IV 1993). States also have tax lien provisions. See, e.g., N.Y. Tax Law § 692(d) (McKinney 1979).

21 See, e.g., 139 Cong. Rec. E2571 (daily ed. Oct. 28, 1993) (text of Health Security Act as submitted to Congress by President Clinton).

22 The Securities Investor Protection Corporation ("SIPC") was authorized by Congress in 1970. See Securities Investor Protection Act of 1970, Pub. L. No. 91-598, 84 Stat. 1636 (codified as §§ 15 U.S.C. 78aaa-78lll (1988)). It is a private, nonprofit corporation of which most broker-dealers are members. If a member fails, SIPC must advance up to $500,000 per customer for unsatisfied claims. § 78fff-3(a). The claims are paid out of a fund that is

§ 1114)?[23]

I doubt that change in Article 9 is the best way to elevate tort claimants or others. To grant priority to tort claimants, retirees or others in Article 9 is to take a step toward its abolition. Once the competitors to the Article 9 security interest become sufficiently numerous, they will stimulate secured creditors to do exactly what they would do if Article 9 were repealed, namely to find alternative modes of priority by leasing, sales of assets, and other devices discussed above. Undoubtedly Article 9 can tolerate some small incursion. But if trade creditors, for example, were given priority over secured creditors in Article 9, that would be tantamount to its repeal.

There are at least three possibilities for elevating the status of tort claimants. First, one could grant them some sort of lien and give that lien a specific priority under Article 9. A model might be section 9-310,[24] which recognizes the priority of mechanics' liens

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replenished by SIPC assessments on members, which they are legally obligated to pay. § 78jjj(a).

The Federal Deposit Insurance Corporation ("FDIC") will repay the bank's depositors up to a limit of $100,000 from the Bank Insurance Fund ("BIF"). 12 U.S.C. § 1821(a) (Supp. V 1993). The BIF is funded through assessments on banks. The Federal Deposit Insurance Corporation Improvement Act of 1991 encouraged the FDIC to impose higher and risk-based assessments. Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (codified at 12 U.S.C. § 1817(b)(1)(A) (Supp. V 1994)).

[23] Section 1114 was added to the Bankruptcy Code in 1988 with the enactment of the Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified at 11 U.S.C. 1114 (1988)). The provision gives special priority status to retiree medical and life insurance benefits in Chapter 11 cases. For a detailed description and analysis of the provision, see Dan Keating, Good Intentions, Bad Economics: Retiree Insurance Benefits in Bankruptcy, 43 Vand. L. Rev. 161 (1990). Congressional sponsors, unhappy with judicial interpretation of § 1114, have since been seeking further amendments to the Code. See, e.g., 138 Cong. Rec. S8343 (daily ed. June 17, 1992) (statement of Sen. Howard M. Metzenbaum) ("Some courts and creditors continue to oppose the payment of retiree benefits. A particular area of concern involves cases in which the debtor or the court has agreed to pay retiree benefits but all of the debtor's assets are subject to secured interests."). Senator Metzenbaum persuaded the Senate Judiciary Committee to adopt language purporting to strengthen protection for retiree benefits under § 1114; that language was later dropped by the full Senate during recent consideration of the Bankruptcy Amendments Act of 1993. 140 Cong. Rec. S4651-52 (daily ed. Apr. 21, 1994) (consideration of Amendment 1654). Other legislation has been proposed to extend § 1114 to Chapter 7. See, e.g., H.R. 272, 103d Cong., 1st Sess. (1993).

[24] The section provides:

When a person in the ordinary course of his business furnishes services or materials claims in certain cases. Second, one could treat tort claims like retiree health care benefits have been treated in Chapter 11 of the Bankruptcy Code.[25] The treatment would have the same impact but would apply only to debtors in bankruptcy.

Finally, one could mandate insurance or set up and operate a quasi-governmental insurance system.[26] FDIC, SIPC, and PBGC are rather crude and mostly underfunded insurance systems. The difficulties of banks and savings and loans in the 1980s have amply demonstrated the problems of such systems, and it is not clear that all of the thought devoted to the FDIC and similar systems can cure those difficulties or that the problems inherent in government insurance are ever curable by a Congress as ill-disciplined as ours.[27]

The two systems, granting priority on the one hand or mandating insurance on the other, doubtless would have significantly different impacts on the credit markets at least in the short run. Presumably a secured creditor faced with the certainty of being subordinated under Article 9 or the probability of being subordinated under Chapter 11 might make some crude calculation about the likelihood of tort claims overwhelming his debtor and adjust his interest rate accordingly or insist that the debtor procure insurance. If, on the other hand, a governmental insurance agency would take up the loss, there would be no need for the secured creditor to make

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> with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

U.C.C. § 9-310.

Mechanics' liens are created by state law to secure payment for work performed or materials provided. This provision grants priority over a perfected security interest to those who acquire a statutory lien on goods in their possession.

[25] See supra note 23.

[26] Of course, President Clinton's Health Security Act and other legislative proposals relating to health care really constitute a comprehensive health insurance scheme. These proposals do not contemplate recovery for economic loss.

[27] Critics have attacked the FDIC insurance scheme as a government-sponsored subsidy that has encouraged high risk investment strategies and insulated banks from the competitive forces of the free market. Commentators have urged reform of the system. See, e.g., Sarah J. Hughes, Banking and Deposit Insurance: An Unfinished Agenda for the 1990s, 68 Ind. L.J. 835 (1993); Michael Klausner, An Economic Analysis of Bank Regulatory Reform: The Financial Institutions Safety and Consumer Choice Act of 1991, 69 Wash. U. L.Q. 695 (1991); Jonathan R. Macey & Geoffrey P. Miller, America's Banking System: The Origins and Future of the Current Crisis, 69 Wash. U. L.Q. 769 (1991).

such a calculation. To keep the conservative from paying for the risky, one would have to adjust the insurance rates in the latter case. Assessing the relative efficiency of priority versus insurance as a solution is far beyond my ability.

I suggest only some evil consequences that might arise from attempting to elevate unsecured creditors by amending Article 9. First, as I have suggested, significant subordination of perfected security interest will drive secured creditors to look for security devices that are more wasteful but more effective (for them). If the probability of overwhelming tort liability is quite low, creditors might ignore it, and tort claimants' priority would have little impact on the credit markets. If, on the other hand, the opening for tort claimants is made so that the hole can be enlarged by judicial reaming—to let through not merely the most pitiful of the unpaid tort claimants, but also those who claim economic loss from libel, fraud, and even negligence—Article 9 might be ruined.

There is a second problem in granting priority to tort claimants. Some of us believe that the tort system is wasteful and that claims for pain and suffering should not enjoy the same status as claims for economic injury.[28] Assuming others share that view, how is the system to grant priority to part of the award and not to the rest?

There is a third problem, that of other security devices. If the Bankruptcy Code grants priority to the tort claimants, it can give them superiority over not only personal property secured claimants but also over other lien holders and real property mortgagees. Article 9 cannot reach real estate mortgagees and only with awkward expansion could it possibly reach and grant priority over other liens in the law of every state.

So I am doubtful that Article 9 is the place to solve the problems of the tort claimants or less deserving unsecured creditors. I am fearful that a term in Article 9 designed to protect certain claimants might be expanded by the judiciary so that it threatens all of Article 9. I am doubtful that we should elevate the claim for pain and suffering, much less the lawyer's claim for his fee, over the claims of other unsecured and secured creditors. At best, modifi-

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[28] See, e.g. Peter W. Huber, Liability: The Legal Revolution and Its Consequences (1988); President's Council on Competitiveness, Agenda for Civil Justice Reform in America 1-6 (1991) (Quayle Commission Report).

cation of Article 9 would be only a half measure because it deals neither with claims secured by real estate nor with claims of nonconsensual lienors.

I believe, therefore, that we should not wage guerrilla warfare over the rights of unsecured creditors. Their rights should be debated by the Congress where legislators can decide whether these rights are best dealt with by amendment to the Bankruptcy Code, by federal insurance or, possibly, left where they are. If these claimants cannot convince Congress of the equity and wisdom of their claims in open debate, guerrilla warfare waged over Article 9 should not give them what Congress will not. This is especially so where available evidence suggests that Congress is reluctant to indulge an expansion of unsecured creditor's rights under the Bankruptcy Code. Recent congressional debate reveals the banks' ability to guide legislation in this area.[29] The Article 9 drafters should not venture down a trail Congress has chosen not to take. In my view, Article 9 was right to ignore these problems; it was absolutely correct to subordinate consensual, unsecured creditors. I hope that Professors Harris and Mooney will not be persuaded otherwise.

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[29] See, e.g., 140 Cong. Rec. S4651-52 (daily ed. Apr. 21, 1994) (statement of Sen. Metzenbaum) (discussing successful lobbying by the Bankers Association).